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No. 93-856

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TICOR TITLE INSURANCE COMPANY, ET AL.,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE NATIONAL CONFERENCE OF INSURANCE LEGISLATORS, AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF THE AMICUS CURIAE

Insurance companies are quasi-public financial institutions whose regulation is essential to the stability of domestic and foreign markets, as well as to the protection of policyholders. For nearly 200 years, the States have exercised almost exclusive authority over the regulation of this business. By the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15 (1945) ("McCarran"), Congress expressly delegated to the States responsibility for such regulation and specifically excluded the business of insurance from federal antitrust and unfair trade practice liability. The States have responded systematically to this charge by enacting comprehensive legislation regulating insurance companies from licensure through dissolution.

Under McCarran, the States are free to enact laws which effectively displace competition with regulation designed to preserve company solvency, notwithstanding the Federal Trade Commission Act. When Congress enacted McCarran, it knew that the States collectively had decided that insolvency of insurance companies is unacceptable, and had determined from experience that unregulated or unrestricted competition may cause insolvency. Congress therefore enacted McCarran to preserve the right of the States to determine whether certain anticompetitive conduct should be sanctioned. The States have a significant interest in protecting their right to make that decision.

Founded in 1969, the National Conference of Insurance Legislators ("NCOIL") is a voluntary national organization of state legislators from 34 states who are involved in the development of public policy and the enactment of insurance-related legislation. NCOIL's members regard that it is their responsibility to reaffirm the traditional primacy of the States in the regulation of insurance.

Pursuant to Rule 37.3 of the Rules of the Court, NCOIL respectfully submits this brief as *amicus curiae* in support of Petitioners. As the organization of legislators who exercise the McCarran right of the States to legislate and regu-

late the business of insurance, NCOIL has a substantial interest in the outcome of this case and is able to provide an additional and broader perspective on the important issues presented. NCOIL believes that this brief will assist the Court in analyzing and resolving these issues. The parties have consented to the filing of this brief, and their written consents have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The first priority of state insurance regulation is preserving company solvency. To this end, the States traditionally have replaced unrestricted competition with comprehensive regulation of the business of insurance. Following the Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 332 U.S. 533 (1944) ("*SEUA*"), Congress enacted McCarran to preserve the States' regulatory authority by, *inter alia*, exempting the business of insurance from federal scrutiny of unfair trade practices under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* ("FTC Act"). NCOIL believes that the Third Circuit's decision impermissibly diminishes that authority.

In particular, the Third Circuit ignored Congress' manifest intent and erred in holding that persons engaged in the business of insurance lose their federal unfair trade practice exemption when they are engaged in underwriting activities. When Congress enacted McCarran, it knew that the States had controlled competition among insurance companies of *all* types through regulation. Indeed, Congress knew that insurance companies would charge premiums based on rates filed by rating bureaus, encompassing underwriting costs and expenses. With that specific knowledge, Congress delegated regulation of the business of insurance to the States and exempted those engaged in that business from federal unfair trade practice liability to the extent such business is regulated by state law. *See infra* part I.

By its rote application of the three part test first articulated in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119

(1982), the Third Circuit has threatened the efficacy of state regulation. As the Court made clear in *United States Dept. of Treasury v. Fabe*, ____ U.S. ____, 113 S. Ct. 2202 (1993), *Pireno* is the wrong test; underwriting activities should be judged under a different standard. *See infra* part II. In any event, NCOIL agrees that *Pireno* is satisfied in this case, to the extent applicable.

The Third Circuit's decision also has impermissibly upset the balance between respect for the States' sovereign capacity to regulate private entities to preserve their solvency for the protection of policyholders and the general public, and exposure of those entities to federal unfair trade practice law. Federal enforcement effectively defeats state regulation by unleashing insolvency-threatening competition. Federalism counsels that the federal government ought to respect the powers and prerogative of states to legislate, regulate and sanction anticompetitive behavior, even if it appears unwise from the point of view of those charged with enforcing federal antitrust or unfair trade practice policy. McCarran evinces Congress' belief that state regulation of the business of insurance should be free of federal interference. NCOIL respectfully submits that it is now incumbent upon this Court to safeguard that protection. *See infra* part III.

NCOIL offers this brief because the Third Circuit has redrawn the lines of federal unfair trade practice liability without regard for the right of the States to regulate the business of insurance. By denying McCarran immunity to the means by which title insurance is underwritten, the court's decision usurps the congressionally endowed regulatory authority of expert state officials and foists it upon an overburdened federal administrative agency and judiciary unfamiliar with the insurance industry and the means to maintain its solvency. If not reversed, the ruling will jeopardize the States' power to regulate the business of insurance and protect the public.

STATEMENT OF THE CASE

NCOIL adopts and subscribes to the statement of the case presented by Petitioners in their Petition to this Court. As a supplement to that statement, NCOIL provides the following background information.

After the Civil War, it was common practice for laypersons in Philadelphia to draft real estate documents of title without engaging in the unauthorized practice of law. *La Brum v. Commonwealth Title Co. of Philadelphia*, 56 A.2d 246, 248 (Penn. 1948). In 1868, however, the Supreme Court of Pennsylvania held that lay conveyancers, like attorneys, owed a duty of reasonable care when searching title. *Watson v. Muirhead*, 57 Pa. 161 (1868).[1] Largely as a result of that decision, the first title insurance company was formed to provide coverage for errors in title search and examination. *See In re Ticor Title Ins. Co.*, Docket No. 9190, Pet. App. at 143a (FTC Dec. 22, 1986) (*"ALJ Opinion"*).

Between the two World Wars, the title insurance market grew as home ownership increased, title insurers recognized that their product complemented the evolving residential mortgage market, and institutional investors began demanding title insurance before granting or purchasing secured loans for the purchase of real estate. D. Barlow Burke, Jr., *Law of Title Insurance* § 1.1.2 (2d ed. 1993); E.F. Roberts, *Title Insurance: State Regulation and the Public Perspective*, 79 Ind. L.J. 1, 8 (1963). Title insurance ultimately became the "imprimatur" of the institutional mortgage, and the "title industry [since] has played a critical role in the

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[1] The Supreme Court of Pennsylvania held that Watson, a purchaser of real estate, had no recourse against Muirhead, a lay conveyancer who had searched and approved the title for Watson, when a judgment of record, determined by Muirhead after taking counsel's advice not to be a final judgment, vitiated Watson's title. The Supreme Court concluded that Muirhead owed Watson a duty of reasonable care and that Muirhead had acted reasonably by obtaining and relying on counsel's advice.

expansion of the secondary mortgage market . . . enabling Americans to have the highest home ownership rate in the world." American Land Title Association, *Title Insurance Industry Statistics 1993*, 1 (1993) ("*ALTA Statistics*").[2] In 1992, total operating revenue of title insurers was $5.231 billion, representing close to a 24 percent increase over 1991 revenue of $4.23 billion, and a 287 percent increase over 1982 revenue of $1.35 billion. *Id.* at 13; *ALJ Opinion*, *supra*, at 137a.

The primary purpose of title insurance has been and remains identifying existing defects and establishing certainty of title:

> The risks of title insurance end where the risks of other kinds begin. Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it.

Trenton Properties Co. v. Title Guar. & Trust Co., 68 N.E. 132, 134 (N.Y. 1903). Thus, title insurance policies generally cover errors in title examination, defects that would be disclosed by an examination which the insurer intentionally omits to make, and hidden defects that would not be disclosed by a title search. Quintin Johnstone, *Title Insurance*, 66 Yale L.J. 492, 495 (1957). Defects that are discovered by

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[2] The secondary mortgage market finances mortgage purchases by packaging mortgages into securities and selling them to investors. W. Criss Peters, *What is the Secondary Mortgage Market?*, Secondary Mortgage Markets, Summer 1993, at 11. It is widely believed that "the efficiency and benefits of the secondary mortgage market have lowered mortgage interest rates . . . saving borrowers up to $15 billion each year in mortgage interest." *Id.* In the first quarter of 1993, the total amount of outstanding securitized mortgage debt equalled approximately $3,266 billion. *Id.*

a title search typically are excluded from coverage. Title insurers also pay the costs, attorneys' fees and expenses incurred in defending the title insured. *Id.* at 500.

A review of relevant statistics reveals that title search and examination are inextricably intertwined with the issuance of a title policy. After excluding defects discovered upon searching titles, title insurers in 1992 paid $388 million in claims, representing an 8.7% decrease from claims payments of $424.4 million in 1991. *ALTA Statistics*, *supra*, at 13, 14. However, since 1980, claims payments and related loss adjustment expenses have represented an average of 8.3% of each operating dollar. *Id.* at 18. During that period, an average of 93.7% of every operating dollar has been spent on expenses like search and examination. *Id.* The reason for this derives from the nature of title insurance:

> Because of the great importance of real estate titles, public policy (in many states incorporated explicitly into statute) has enjoined title insurers to establish their underwriting criteria at a high level of stringency, eliminating all risks they possibly can through careful examinations of title before issuing insurance. Consequently, title insurers operate by collecting premiums, much of which are used to cover the *ex ante* underwriting costs associated with the insurance of a title insurance policy, *(sic)* Therefore, in contrast to property casualty insurers, title insurers cannot retain most of the premium dollar for any significant time before it is expended in the ordinary course of business.

Id. at 20.

Recognizing their essential role in the business of insurance, the States have enacted legislation focusing on title searches and examination. Of the four jurisdictions involved in this case (Arizona, Connecticut, Montana and Wisconsin), three have statutes requiring that a title search and examination be made before a policy is issued. *See* Appendix. Twenty-one other jurisdictions impose the same requirement, while another 7 implicitly recognize the essential role title

searches play in the title insurance business.[3] *See* Appendix. Obviously, these States consider title search and examination to be part of the business of insurance that they may regulate. In addition, 35 states and two territories either require or authorize title insurers to own, maintain or invest in a title plant.[4] *Id.* By authorizing investments in title plants, many of these states have acknowledged their importance, as well as the significant expense of their operation. *Id.*

State regulation has preserved the solvency of title insurance companies. At present, the States require that considerable reserves be set aside to protect policyholders against the risk of an insurer's insolvency. The title insurance industry currently has a state mandated reserve which may be used only in the event of a title insurer's liquidation; at the end of 1992, the reserve exceeded $1.3 billion. *ALTA Statistics, supra,* at 27. In addition, title insurers had approximately $1.7 billion in surplus and almost $350 million in reserves for the payment of reported claims. *Id.* In sum, "total policyholder protection was in excess of $3.3 billion at year-end 1992." *Id.*

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[3] Reflecting the indispensability of title searches and examinations in the underwriting process, Section 12 of the National Association of Insurance Commissioners Model Title Insurance Act prohibits the issuance of a title policy unless and until the title insurer or its agent has caused to be conducted a reasonable search and examination of the title.

[4] Section 3(V) of the Model Act defines a title plant as "a set of records in which an entry has been made of documents or matters imparting constructive notice under the law of matters affecting title to real property or any interest therein or encumbrance thereon, which have been filed or recorded in the jurisdiction for which such title plant is maintained." Model Act § 3(V). "The general requirement that there be an extensive search and examination of the relevant public records coupled with the disarray and geographical dispersion of these records, has fostered, in many locales, the development of privately owned, indexed data bases." *ALTA Statistics, supra,* at 2.

ARGUMENT

I. THE THIRD CIRCUIT HAS VITIATED CONGRESS' EXPRESSED INTENT TO PRESERVE STATE CONTROL OF THE BUSINESS OF INSURANCE

The States have regulated the business of insurance from the start. Pursuant to the congressional mandate expressed in McCarran, state regulation controls competition within, and preserves the solvency of, what has become the largest regulated private enterprise in the United States. Congress fully understood the enormity of the task it had entrusted to the States, and since then has not seen fit to rescind McCarran in any respect.

Before any federal unfair trade practice legislation was enacted, this Court held that insurance was not interstate commerce. *Paul v. Virginia*, 75 U.S. 168 (1868). Enacted in 1914, the FTC Act was federal law which applied only to persons engaged in interstate commerce. Congress obviously did not intend this statute to apply to the business of insurance because *Paul* established that insurance was not interstate commerce. House Comm. on the Judiciary, *Expressing the Intent of Congress with Reference to the Regulation of the Business of Insurance*, H.R. Rep. No. 143 at 2 (1945) ("House Report 143"). In 1944, however, this Court in *SEUA* abandoned *Paul* and held that insurance was interstate commerce. *SEUA*, 332 U.S. at 553.

Under *SEUA*, collective activities between persons engaged in the business of insurance were subjected to federal unfair trade practice scrutiny for the first time. Until then, insurance companies could become members of rate-making bureaus and charge uniform rates as long as the States approved their collective activity. Confronted with a "practical situation," 91 Cong. Rec. 1484 (1945) (statement of Sen. Murdock), Congress enacted McCarran to preserve the *status quo ante*, with the exception that persons engaged in the business of insurance could be subject to federal unfair trade practice liability only if a state did not regulate such activity, 15 U.S.C. § 1012(b), or if the activity was an act of "boycott, coercion or intimidation." 15 U.S.C. § 1013(b). *See* Spencer

L. Kimball & Barbara P. Heaney, *Emasculation of the McCarran-Ferguson Act: A Study in Judicial Activism*, 1985 Utah L. Rev. 1, 9-10. In all other respects, such persons would remain exempt. *See* 91 Cong. Rec. 1090 (1945) (statement of Sen. Gwynne) ("the Federal Trade Commission Act should not apply to insurance"); *accord* 91 Cong. Rec. 1396 (1945) (House of Representatives Conference Report); 91 Cong. Rec. 1443 (1945) (statement of Sen. Ferguson). The States once again would supervise and control anticompetitive activity in the business of insurance, subject to Congress' retained power to enact specific legislation relating to that business. 15 U.S.C. § 1012(b). Congress thus was not concerned that insurance companies might continue conferring about business practices or establishing uniform rates or rating bureaus. *See, e.g.*, House Report 143, *supra*, at 2; *see also* 91 Cong. Rec. 1087 (1945) (statement of Sen. Celler). McCarran ensured that the States would continue to regulate such activity through politically-accountable experts armed with an arsenal of remedies to redress unlawful activity.

Congress' intent that the States fulfil their traditional role of regulating the business of insurance is plainly stated in McCarran:

> Congress declares that the *continued regulation* and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.

15 U.S.C. § 1011 (emphasis added). Congress' report on the statute is equally clear:

> From its beginning the business of insurance has been regarded as a local matter, to be subject to and regulated by the laws of the several states. . . . [T]here is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States.

House Report 143, *supra*, at 2.

Congress exempted the business of insurance from federal unfair trade practice laws because it knew that unrestrained competition in that business may cause insolvency. Larry D. Carlson, *The Insurance Exemption from the Antitrust Laws*, 57 Tex. L. Rev. 1127, 1138-39 (1979). The reason for this lies in the unique nature of insurance as a promise of future indemnity. As Senator Ferguson explained:

> I think the insurance companies have convinced many members of the legislature that we cannot have open competition in fixing rates on insurance. There will be failures, and failures always follow losses.
>
> The sale of insurance is not the same as the sale of an article in a store. When one buys an article in a store, he brings it home with him. In the case of insurance, he buys a promise to pay upon the happening of a certain event, and that event may be the burning of his home. If the company is not sound and solvent at the time the house burns, or at the time claim is made, there is no insurance at all. That is what we have tried to avoid.

91 Cong. Rec. 1481 (1945). Thus, the financial stability and solvency of insurance companies were (and remain) of prime importance and Congress knew this when it enacted McCarran. *See* National Association of Insurance Commissioners, *Report of Subcommittee on Federal Legislation to Executive Committee*, 90 Cong. Rec. A4403, A4404 (1944) ("NAIC Report"). Before *SEUA*, insurers worked with one another and with regulators to control competition and preserve the financial integrity of their industry through, *inter alia*, regulation of rates and fees. McCarran was designed to enable the States to continue to regulate such anti-competitive behavior in order to preserve insurer solvency, even to permit "certain agreements . . . which might conceivably be a violation of the antitrust law. . . ." 91 Cong. Rec. 1444 (1945) (statement of Sen. O'Mahoney).

There can be little doubt that Congress intended title insurers to operate under the FTC Act exemption. On November 16, 1944, Senator Hatch introduced in the Senate

the NAIC Report. *See* 90 Cong. Rec. A4403 (1944). This report contained the draft legislation which became Senate Bill 340, later enacted as the McCarran-Ferguson Act. *See* 91 Cong. Rec. 483 (1945) (statement of Sen. O'Mahoney); 91 Cong. Rec. 1087 (1945) (statement of Sen. Hancock). The report traced the history of state regulation of the business of insurance and specifically listed title insurance as one of the "22 major kinds of insurance" regulated by the State of New York. NAIC Report, 90 Cong. Rec. A4404. The report continued, "Each of these major kinds of insurance embraces a wide variety of coverages, in some instances running into the hundreds. All of this development has of necessity been based upon affirmative State regulation and the inapplicability of existing Federal statutes, such as the Federal Trade Commission Act . . . ." *Id.* The significance of this history lies in this Court's own acknowledgement that common perceptions at the time McCarran was enacted regarding the scope of the business of insurance are "highly significant in ascertaining congressional intent." *Royal Drug Co.* at 227.

It is equally clear that Congress intended the States to determine the extent to which rates should be regulated, regardless whether the States' own laws permitted agreements that otherwise would violate the FTC Act, as long as they did not involve acts or agreements of boycott, coercion or intimidation. *See* 91 Cong. Rec. 479 (1945) (statement of Sen. Ferguson); 91 Cong. Rec. 1481 (1945) (statement of Sen. Ferguson). Only the latter restraints on trade or monopolization were to be proscribed. *See* 91 Cong. Rec. 480 (1945) (statement of Sen. Ferguson). Congress knew that the States' insurance regulators regarded themselves as "zealous in the desire to safeguard States' rights," 90 Cong. Rec. A4403 (1944) (statement of Sen. Hatch), and that those regulators considered the States to be "closer to the people than is the Nation . . . (and) better able to deal with insurance problems arising in their several jurisdictions." NAIC Report, 90 Cong. Rec. A4405. Congress also knew that "state regulation ha[d] resulted in the development of a tremendous industry which is vital to the welfare of the people of

the country." 91 Cong. Rec. 1483 (1945) (statement of Sen. Radcliffe). Accordingly, Senator Revercomb simply and appropriately summarized the very purpose of the antitrust exemption: "to restore the control of the insurance business to the States." 91 Cong. Rec. 485 (1945). Thus, states could legitimize the practice of fixing rates by a rating bureau. *See* 91 Cong. Rec. 1481 (1945) (statement of Sen. Ferguson). In so doing, the solvency of insurance companies could be maintained by the regulators closest to them.

As demonstrated above, the business of insurance and state regulation of that business have grown substantially under McCarran. At Congress' behest, all but four states and one territory have enacted legislation regulating the business conducted by over 90 title insurance companies, having $3.3 billion in assets for the protection of policyholders. To date, Congress has not seen fit to alter this *status quo*.

NCOIL is concerned that the Third Circuit's decision undercuts the States' ability to effectively regulate the business of insurance and will have undesirable repercussions for the entire insurance industry. The Third Circuit mischaracterized the nature of search and examination when it likened those activities to "many other arrangements title companies make for services in an effort to reduce costs. Ticor cannot claim that its title searchers determine the risk it agrees to underwrite any more than . . . its secretarial staff . . . ." Pet. App. at 11a. In doing so, the court ignored the essential role that risk identification and evaluation activities play in the calculation of premium an insured must pay in consideration for an insurer assuming the risk. If the States cannot regulate the very activity which identifies the risks assumed by insurance companies, and represents title insurers' largest expense, the States' ability to effectively regulate the business of insurance and preserve the solvency of insurance companies will be seriously undermined, if not altogether lost, and Congress' expressed intent will have been subverted.

In view of these facts and Congress' clear statement of intent in McCarran, the Third Circuit's opinion should not be permitted to stand without review by this Court.

II. THE THIRD CIRCUIT HAS IGNORED COMMERCIAL REALITY BY HOLDING THAT UNDERWRITING AND RATE SETTING ARE NOT THE "BUSINESS OF INSURANCE"

The Third Circuit's unwieldy application of *Pireno's* three-pronged test is attributable to the absence of clear guidance from the Court on the applicability of that test to underwriting and rate setting activities. Last term, this Court established that the *Pireno* test was not intended to apply in all circumstances. *See Fabe.* The applicability of the *Pireno* test to title insurance—indeed, its utility in analyzing the propriety of pre-policy issuance activities in any line of insurance—has been called into question by the Third Circuit's decision. This Court's guidance is needed now.

The significance of title search and examination to the title insurance process has been stressed. *See supra* part I. Title search and examination provide an insurer with the information necessary to ascertain the present state of the record title, allow the insurer to decide whether it will insure title defects disclosed by the search and examination or, alternatively, except them from coverage, and enable potential title impairments to be identified, and either accepted or remedied in order to make the risk acceptable to the insurer. John C. Christie, Jr., *The Title Insurance Industry: A Re-examination Revisited*, 18 Real Est. L.J. 354, 358-59 (1990). Indeed:

> [T]he fact is that title search and examination are necessary prerequisites to the establishment of a title insurance relationship between an insurer and the insured and is the essence of underwriting in a title insurance context. No title insurer can even begin to formulate, much less issue, a title policy without appraising the risks to be insured. Search and examination determine what the insurer is insuring and shape the terms of the policy. This information and analysis serve functions analogous to those served by loss expectancy or actuarial tables in other lines of insurance. The tables are a means of predicting the occurrence of events that create policy liabilities, and thus they supply information useful in

> making underwriting judgments. It is principally title search and examination that supply the information necessary for title insurers to make similar underwriting judgments.

Id. at 360-61 (footnote omitted).

Reflecting this commercial reality, every federal court decision prior to the Third Circuit's majority opinion recognized and emphasized the integral relationship between title search and examination and the title insurance policy ultimately issued. *See* Petitioners' Brief at 13-14. The Third Circuit's majority opinion vitiates the sound reasoning of these authorities and should be reversed.

This Court's reasoning in *Fabe* also mandates review (and reversal) of the Third Circuit's majority decision. *Fabe* indicates that the *list of activities* deemed to constitute the "business of insurance" should be expanded beyond the scope of the narrow test adopted by the Third Circuit in interpreting *Pireno*. The specific issue in *Fabe* was whether a "state statute establishing the priority of creditors' claims in a proceeding to liquidate an insolvent insurance company is a law enacted 'for the purpose of regulating the business of insurance,' within the meaning of § 2(b) of the McCarran-Ferguson Act . . . ." *Fabe* at 2204. In answering "yes" to this question, this Court revisited its holdings in *Pireno* and *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), and explained that those cases held only that ancillary activities not affecting the performance of an insurance contract or the enforcement of contractual obligations did not enjoy the antitrust exemption for laws regulating the business of insurance. In other words, neither *Pireno* nor *Royal Drug* addressed the underwriting or issuance of an insurance policy, and cannot be deemed to have answered the question posed in this case.

The underlying principles articulated by the Court in *Fabe* are reminiscent of the oft-quoted language in *Securities & Exchange Commission v. National Securities, Inc.*, 393 U.S. 458, 460 (1969), that the "relationship between insurer and

insured, *the type of policy which could be issued, its* reliability, *interpretation*, and enforcement—these were the core of the 'business of insurance.' " More germane is the Court's statement that,

> [t]o be sure, the Ohio statute does not *directly* regulate the 'business of insurance' by *prescribing the terms of the insurance contract or by setting the rate charged by the insurance company*. But we do not read *Pireno* to suggest that the business of insurance is *confined entirely to the writing of insurance contracts*, as opposed to their performance.

Fabe at 2209 (emphasis added). These words manifest the Court's acceptance of the proposition that the writing of an insurance policy is the "business of insurance" and that the McCarran unfair trade practice exemption is not limited to the physical act of issuing an insurance policy.

The term "business of insurance" simply cannot be confined to one particular event that consumes only a moment in time. Rather, it comprehends a process consisting of several activities—*i.e.*, determining (or prescribing) the terms of insurance contracts based on risk evaluation, recording the contract terms in a policy and setting rates—that are instrumental in, and indispensable to, the issuance of an insurance policy. The formality of recording the policy terms is an empty act standing alone; it is the terms of that contract that are meaningful. These terms are determined not randomly, but through numerous pre-issuance activities which vary depending on the line of insurance that, among other things, identify and evaluate the respective risks to be borne by the contracting parties. Foremost among these activities in title insurance is the identification of risk through the title search and examination process. Title search and examination determine the risks to be borne by the parties to the policy. They cannot be severed from "the writing of insurance contracts" or, for that matter, the execution of the insurance contract itself (*i.e.*, signature, delivery and acceptance). Each of these activities is an important element in the entire process of issuing a title insurance policy, yet none

in and of itself "transfers or spreads risk," the first *Pireno* criterion the Third Circuit interpreted.

Fabe approvingly quotes *Pireno* to the effect that the "transfer of risk from insured to insurer is effected by means of the contract between the parties . . . and . . . is *complete* at the time that the contract is entered." 458 U.S. at 130 (emphasis added). Obviously, to say that a transfer is "complete" when the contract is signed presumes that the transfer has begun prior to that time. As demonstrated above, the transfer of risk in title insurance begins during the search and examination process, when the risks to be allocated under the policy are discovered and evaluated. These activities are part and parcel of a risk transfer process which is "completed" when the policy is issued. If *performance* of an insurance contract is considered to be part of the "business of insurance," then surely the contract terms by which performance is measured, and the pre-recording determination of those terms, also must be part of such business.

If *Pireno* means that search and examination are not considered to be part of the process that transfers or spreads risk, then the *Pireno* test is simply inadequate to determine the legality of the pre-policy issuance activities of insurance companies. For, if the Third Circuit correctly applied *Pireno*, then it is doubtful that *any* pre-issuance activity of insurers could comply with each of the three criteria established by that case. A telling example: it is undisputed that the "primary concern of both representatives of the insurance industry and the Congress was that cooperative ratemaking efforts be exempt from the antitrust laws[,]" *Royal Drug* at 221, so much so that it is "clear from the legislative history that the fixing of rates is the 'business of insurance.' " *Id.* at 224 n.32. *See also Securities & Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 460 (1969) ("*[c]ertainly* the fixing of rates is part of [the] business [of insurance]") (emphasis added). Yet even rate agreements among insurers do not themselves spread risk and would

fail the *Pireno* test as interpreted by the Third Circuit. *See Royal Drug* at 244 (Brennan, J., dissenting).

To be sure, not all activities in which an insurance company might engage may be considered the "business of insurance." Courts must focus on the relationship between the insurance company and policyholder and the purpose of the insurance—to spread and transfer risk. Nonetheless, courts should be realists, capable of understanding that the issuance of an insurance policy, and the transfer of risk, is not an event that occurs in the "blink of an eye." It is a gradual process that advances to the signing of the contract and the payment of the premium, and culminates with the payment of claims, if any. While not all activities comprising that process might be considered the "business of insurance," certainly those that are inseparable from and indispensable to the policy's issuance should be so considered. In this case, title search and examination—the activity that identifies and determines the risk that will be identified, allocated and transferred in a policy—is such an activity.

The Third Circuit's opinion literally obliterates the McCarran exemption for the "business of insurance" by ignoring the realities of the insurance process and the purpose for which the McCarran exemption to the antitrust laws was promulgated. Under the Third Circuit's approach, even rate-making, the principal insurance activity sought to be preserved by McCarran, falls beyond the scope of the phrase "business of insurance." This Court's review is crucial to define the proper application of *Royal Drug* and *Pireno* to pre-issuance activities and the title insurance industry.

III. THE THIRD CIRCUIT'S DECISION UNDERMINES FEDERALISM

The States are obliged to shield and protect their powers and prerogatives as sovereign entities under our federal system of government. The issue in this case lies at the cusp of the separation of powers visited in the States on the one hand and the national government on the other. The States'

regulatory processes were designed to preserve the solvency of insurance companies by restricting competition among, and encouraging the adoption of established rates by, all of the players within the insurance business community. The Third Circuit's decision, however, has removed the federal unfair claims practice protection upon which all such actors have relied, because it effectively has removed that protection from the underwriting of all insurance policies. If not reversed, the ruling will inhibit the States' ability to effectively regulate the business of insurance.

As demonstrated above, the insurance industry's competitiveness, financial strength and solvency are closely regulated by the States. Uncertain as to whether state or federal law governs their activities, insurance companies now will curb, if not abandon, participation in the collaborative processes upon which successful state regulation depends. Without this cooperation, state regulation of the insurance industry will be seriously compromised, and the public good will be subverted.

In McCarran, Congress set the scales of balance between federal and state authority over the business of insurance. The Third Circuit's erroneous analysis has upset that balance. By subjecting the defendants to federal unfair trade practice liability for insurance practices approved by the States, the court's ruling inhibits collaborative efforts among insurance and reinsurance companies and deters them from participating in state regulatory processes. To invalidate long-standing and thoughtfully developed state regulation of established insurance practices vitiates the principle that McCarran was enacted to protect. As Congress made clear in McCarran, politically accountable state legislators and officials have been allocated regulatory control over the business of insurance. The Third Circuit has unnecessarily upset the federal/state balance and impaired federalism in the process. Its decision should be reviewed and reversed.

CONCLUSION

Experienced and knowledgeable state legislatures and officials are best placed to balance competing goals of competition and solvency in the business of insurance. While a truly competitive environment presupposes that some businesses will become insolvent, this risk is unacceptable in the insurance business community. The overriding concern of policyholders is that their insurance companies will be able to meet future claims, because the product sold by those companies is a promise to pay future losses. As Congress recognized when it adopted McCarran, federal unfair trade practice laws neither were enacted, nor did they evolve, with this concern in mind. State legislative and regulatory bodies have grappled with this issue for decades and are best suited to guard against insurance insolvency. Superimposing federal laws upon the insurance industry and well-established, sophisticated state regulatory systems will throw them into unnecessary turmoil, and does not begin to address the solvency of a business that the States have been charged to protect in the public interest.

For all of these reasons, the Third Circuit's decision should be reviewed and reversed.

Respectfully submitted,

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APPENDIX

State	Title Insurance Regulation*	Mandatory Title Search and Examination	Reference(s) to Title Search and Examination	Mandatory Title Plant Ownership and/or Maintenance	Authorized Investment in Title Plant and/or Records
Alabama	NO				
Alaska	YES	Alaska Stat. § 21.66.170 (1993)		Alaska Stat. § 21.66.200 (1993)	Alaska Stat. § 21.66.240 (1993)
Arizona	YES	Ariz.Rev.Stat.Ann. § 20-1567 (Supp. 1993)		Ariz.Rev.Stat.Ann. § 20-1567B (Supp. 1993)	Ariz.Rev.Stat.Ann. § 20-1564F (1956)
Arkansas	YES				Ark. Code Ann. § 23-63-832 (Michie 1987)
California	YES		Cal. Ins. Code §§ 12340.1, 12340.5, 12389 (Deering 1977 & Supp. 1994)		Cal. Ins. Code §§ 12372, 12372.5, 12389 (Deering 1977 & Supp. 1994)
Colorado	YES	Colo.Rev.Stat.Ann. § 10-11-106 (1987)			Colo.Rev.Stat.Ann. § 10-11-114 (1987)
Connecticut	YES	Conn.Gen.Stat.Ann. § 38a-407 (1992)			Conn.Gen.Stat.Ann. § 38a-412 (1992)
Delaware	YES				Del. Code Ann. tit.18, § 1322 (1989)
Florida	YES	Fla.Stat.Ann.ch.627 § 627.7845 (Supp. 1993)			Fla.Stat.Ann.ch.625 § 625.330 (West 1984)

* The extent of regulation varies considerably among the different jurisdictions.

State	Title Insurance Regulation*	Mandatory Title Search and Examination	Reference(s) to Title Search and Examination	Mandatory Title Plant Ownership and/or Maintenance	Authorized Investment in Title Plant and/or Records
Georgia	YES				Ga. Code Ann. § 33-11-27 (1992)
Hawaii	YES	Haw.Rev.Stat. § 431:20-113 (1988)			Haw.Rev.Stat. § 431:20-110 (1988)
Idaho	YES	Idaho Code § 41-2708 (1991)			Idaho Code § 41-726 (1991)
Illinois	YES		215 ILCS 155/3		215 ILCS 155/7(b)
Indiana	YES				
Iowa	NO				
Kansas	YES	Kan.Stat.Ann. § 40-235(b) (1986)			
Kentucky	YES		Ky.Rev.Stat.Ann. § 304.22-030 (Michie 1988)		Ky.Rev.Stat.Ann. § 304.7-250 (Michie 1988)
Louisiana	YES				
Maine	YES				Me.Rev.Stat.Anr.. tit.24-A, § 1129 (West 1964)
Maryland	YES				
Massachusetts	YES				
Michigan	YES		Mich. Comp. Laws Ann. § 500.7304 (West 1993)		Mich. Comp. Laws Ann. § 500.901 (West 1993)

State	Title Insurance Regulation*	Mandatory Title Search and Examination	Reference(s) to Title Search and Examination	Mandatory Title Plant Ownership and/or Maintenance	Authorized Investment in Title Plant and/or Records
Minnesota	YES				Minn.Stat.Ann. § 68A.01 (West 1986 & Supp. 1994)
Mississippi	YES				
Missouri	YES	Mo.Rev.Stat. § 381.071 (1991)			Mo.Rev.Stat. § 381.121 (1991)
Montana	YES	Mont. Code Ann. § 33-25-214 (1993)			Mont. Code Ann. § 33-2-851 (1993)
Nebraska	YES	Neb.Rev.Stat. § 44-1947 (Supp. 1992)			Neb.Rev.Stat. § 44-5150 (Supp. 1992)
Nevada	YES	Nev.Rev.Stat. § 692A.220 (1993)			Nev.Rev.Stat. § 682A.220 (1993)
New Hampshire	YES	N.H.Rev.Stat.Ann. § 416-A:6 (1991)			N.H.Rev.Stat.Ann. § 416-A:14 (1991)
New Jersey	YES	N.J.Rev.Stat.Ann. § 17:46B-9 (West 1985)			N.J.Rev.Stat.Ann. § 17:46B-22 (West 1985)
New Mexico	YES	N.M.Stat.Ann. § 59A-30-11 (Michie 1992)			N.M.Stat.Ann. § 59A-9-20 (Michie 1992)
New York	YES		N.Y. Ins. Law § 6403 (McKinney 1985 & Supp. 1994)		N.Y. Ins. Law § 6404 (McKinney 1985)

State	Title Insurance Regulation*	Mandatory Title Search and Examination	Reference(s) to Title Search and Examination	Mandatory Title Plant Ownership and/or Maintenance	Authorized Investment in Title Plant and/or Records
North Carolina	YES	N.C.Gen.Stat. § 58-26-1 (1991)			N.C.Gen.Stat. §§ 58-7-182, 58-26-15 (1991)
North Dakota	YES	N.D.Cent. Code § 26.1-20-05 (1989)			
Ohio	YES	Ohio Rev. Code Ann. § 3953.07 (Baldwin 1989)			Ohio Rev. Code Ann. § 3953.14 (Baldwin 1989)
Oklahoma	YES	Okla.Stat. tit.36 § 5001 (1990)			Okla.Stat. tit.36 § 5002 (1990)
Oregon	YES			Or.Rev.Stat. § 731.438 (1989)	Or.Rev.Stat. § 733.690 (1989)
Pennsylvania	YES	Pa.Stat.Ann. tit.40, § 910-7 (1992)			Pa.Stat.Ann. tit.40, § 910-32 (21) (1992)
Rhode Island	NO				
South Carolina	YES				
South Dakota	YES		S.D. Codified Laws Ann. § 58-25-1 (1990)	S.D. Codified Laws Ann. § 36-13-10, 58-25-16 (1990)	
Tennessee	YES	Tenn. Code Ann. § 56-35-129 (1989)			Tenn. Code Ann. § 56-35-103 (1989)
Texas	YES	Tex.Ins. Code Ann. § 9.34 (West Supp. 1994)			Tex. Ins. Code Ann. § 9.18 (West Supp. 1994)

State	Title Insurance Regulation*	Mandatory Title Search and Examination	Reference(s) to Title Search and Examination	Mandatory Title Plant Ownership and/or Maintenance	Authorized Investment in Title Plant and/or Records
Utah	YES	Utah Code Ann. § 31A-20-110 (1991)			
Vermont	YES				
Virginia	YES		Va. Code Ann. § 38.2-4608 (Michie Supp. 1993)		Va. Code Ann. § 38.2-4604 (Michie 1990)
Washington	YES				Wash.Rev. Code Ann. § 48.29.130 (1984)
West Virginia	NO				
Wisconsin	YES				
Wyoming	YES	Wyo.Stat. § 26-23-308 (1991)			Wyo.Stat. § 26-23-313 (1991)
District of Columbia	NO				
Puerto Rico	YES				P.R. Laws Ann. tit.26, § 2403 (1976)
Virgin Islands	YES				V.I. Code Ann. tit.22 § 1159 (1993)